No. 23A-____

IN THE SUPREME COURT OF THE UNITED STATES

STEPHEN K. BANNON,
Applicant,

v.

UNITED STATES OF AMERICA,
Respondent.

EMERGENCY APPLICATION FOR CONTINUED RELEASE PENDING APPEAL

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Applicant is Stephen K. Bannon. Respondent is the United States of America.

The proceedings below were *United States of America v. Stephen K. Bannon*, No. 1:21-cr-670 (D.D.C.), and *United States of America v. Stephen K. Bannon*, No. 22-3086 (D.C. Cir.).

The District Court previously granted Mr. Bannon's request for release pending appeal but lifted that decision after the D.C. Circuit issued a panel opinion on May 10, 2024, affirming Mr. Bannon's convictions on two counts of contempt of Congress. The District Court ordered Mr. Bannon to surrender by July 1, 2024. On June 20, 2024, the D.C. Circuit denied Mr. Bannon's emergency motion for release pending appeal, with Judge Walker dissenting in a separate opinion.

To the Honorable John G. Roberts, Chief Justice of the United States and Circuit Justice for the D.C. Circuit:

Pursuant to 18 U.S.C. § 3143(b), Appellant Stephen K. Bannon seeks continued release pending further appeal of his convictions in this case. Given his surrender date of July 1, 2024, he respectfully requests a ruling before that date, and an administrative stay of the surrender date if necessary to allow for sufficient time to consider this matter.

INTRODUCTION

Applicant Mr. Bannon seeks the narrow relief of continued bail pending completion of his further appeals—relief that Judge Walker would have granted below, as explained in his dissent. Ex.A.4 (Walker, J., dissenting). This relief is warranted because the D.C. Circuit's precedent on the relevant *mens rea* element is contrary to this Court's uniform caselaw on the meaning of "willfully" in the criminal context, and absent relief Mr. Bannon will be forced to serve his entire term before this Court has the opportunity to review that issue. This case therefore easily satisfies the requirements for continued bail pending certiorari. *See* Ex.A.4 (Walker, J., dissenting).

There is no dispute that Mr. Bannon "is not likely to flee or pose a danger to the safety of any other person or the community if released"—indeed, he has been out on release for years now without incident, and his "crime" was non-

violent. 18 U.S.C. § 3143(b)(1)(A). Nor is there any claim that his continued pursuit of appeal is "for the purpose of delay." *Id.* § 3143(b)(1)(B).

Accordingly, Mr. Bannon "shall" be released if his case "raises a substantial question of law or fact," that, *if accepted*, would result in reversal, a shorter sentence, or a new trial. *Id.* That requires "only a non-frivolous issue that, if decided in [his] favor, would likely result in reversal or could satisfy one of the other conditions." *United States v. Garcia*, 340 F.3d 1013, 1020 n.5 (9th Cir. 2003).[1] As explained below in Part I, this is not the same standard for obtaining a stay. Mr. Bannon is *not* required to show he is likely to succeed on that issue or that there has been reversible error—a point that even the D.C. Circuit majority order did not dispute below. *See* Part I, *infra*; Ex.A.

This case raises at least two substantial questions that satisfy this standard. The first involves the definition of the *mens rea* element in 2 U.S.C. § 192 for "willfully … default[ing]" on a congressional subpoena. 2 U.S.C. § 192. This Court has long held that "willfulness" in the criminal context requires the defendant to understand what he is doing is unlawful. Indeed, it appears that is the *uniform* interpretation this Court has adopted in the criminal context. And that reading is especially strong here because § 192, in the very same

[1] The D.C. Circuit has adopted a noticeably stricter test, requiring the movant to show "a 'close' question or one that very well could be decided the other way." *United States v. Perholtz*, 836 F.2d 554, 555 (D.C. Cir. 1987); *see* Part IV, *infra*.

sentence, *omits* "willfully" when criminalizing a different set of actions. Congress clearly meant to impose a different and higher *mens rea* for the provision applied to Mr. Bannon.

The proper *mens rea* is a critical issue because Mr. Bannon relied in good faith on his attorney's advice not to respond to a subpoena issued by a House Select Committee *until* executive privilege issues were resolved—as they had been on *three prior occasions* when Mr. Bannon had agreed to testify after President Trump's counsel had asserted executive privilege. Following their prior practice, Mr. Bannon's counsel asked the Committee to resolve those privilege issues with the holder of that privilege, or have the matter resolved in a civil suit. Instead of pursuing those routes as was done in the past, the House swiftly voted to hold Mr. Bannon in contempt, and then the government quickly indicted him under § 192.

Despite Mr. Bannon's reliance on his counsel's advice in good faith, and despite the fact that § 192 requires "willfulness" for a default, the District Court (Hon. Carl Nichols) reluctantly concluded that *Licavoli v. United States*, 294 F.2d 207 (D.C. Cir. 1961), barred Mr. Bannon from presenting *any* evidence or argument to the jury regarding his good faith reliance on his lawyer's advice or that Mr. Bannon believed his actions were in compliance with the law. Ex.D.7. *Licavoli* had held that "willfully" in § 192 meant only

"intentionally," i.e., not by mistake or accident, and that good faith reliance on counsel could not be raised even as a defense.

Judge Nichols explained, "As I've stressed many times, I have serious reservations that the Court of Appeals' interpretation of willfully [in *Licavoli*] is consistent with the modern understanding of the word. It's not consistent with modern case law surrounding the use of the term, let alone the traditional definition of the word. But as I've previously held and I reiterate today, I am bound by *Licavoli* and its holdings." JA2993.[2]

This permitted the government to argue falsely to the jury that Mr. Bannon had "ignore[d]" the subpoena and "thumb[ed] his nose" at the Select Committee. JA3913–16. The jury heard that the only explanation for his decision was that he thought he was "above the law" and "didn't care" and "had contempt" for the Committee. JA4518. The jury convicted Mr. Bannon, and he was sentenced to four months' imprisonment, which the District Court stayed, citing concerns about whether *Licavoli* was still binding and whether the Committee lacked proper subpoena authority.

A panel of the D.C. Circuit affirmed the convictions, but did so based on its belief that *Licavoli* likewise bound the panel to hold that good faith reliance on advice of counsel is completely irrelevant—not even a defense. Ex.D.

[2] "JA" refers to the joint appendix filed at the D.C. Circuit on May 3, 2023.

Even though Judge Walker joined that unanimous panel opinion, he subsequently dissented from the denial of release pending appeal. Ex.A.4. As he aptly explained, "Because the Supreme Court is not bound by *Licavoli*, because *Licavoli*'s interpretation of 'willfully' is a close question, and because that question may well be material, Bannon should not go to prison before the Supreme Court considers his forthcoming petition for certiorari." Ex.A.5 (Walker, J., dissenting).

Indeed, *Licavoli*'s interpretation of "willfully" is contrary to this Court's precedent and canons of construction. *See* Part II, *infra*. As the D.C. Circuit panel acknowledged, this Court has held that the "'general' rule" is that "willfully" means "knowledge that his conduct was unlawful," which strongly favors Mr. Bannon. Ex.D.9. In fact, that appears to be this Court's *uniform* rule in the criminal context. But the panel felt obliged to disregard this Court's rule because of *Licavoli*. Ex.D.10. As Judge Walker explained in his dissent from the denial of release, however, this Court "will have no such obstacle." Ex.A.4 (Walker, J., dissenting).

Further, *Licavoli* relied on the fact that this Court had rejected an advice-of-counsel argument in the context of the *separate* provision of § 192 that does *not* contain a "willfully" modifier. But under this Court's approach to statutory construction, Congress's use of two different *mens rea* thresholds in the very same provision is strong evidence that the two clauses impose *different*

tests. *Licavoli* is especially unpersuasive because this Court had already expressly recognized that "[t]wo distinct offenses are described in the disjunctive [in § 192], and in only one of them is willfulness an element." *United States v. Murdock*, 290 U.S. 389, 397 (1933).

Taken together, these factors confirm the *mens rea* issue is a "substantial" question, just as Judge Walker concluded.

Although § 3143 does not require Mr. Bannon to make a showing that this Court would actually grant review on this issue, there are good reasons to believe the Court would do so. *See* Part III, *infra*. This Court has long taken an interest in § 192, granting no fewer than *nineteen cases* on its interpretation over the years and has also repeatedly granted cases on willfulness. Further, the stakes could not be higher. Under the D.C. Circuit's caselaw, future disagreements about subpoena compliance will be met not with negotiation—but with indictments.

Moreover, this Court has previously granted continued release pending appeal in similar contexts even when the lower court decision was unanimous and no judge had voted in favor of en banc rehearing. *See, e.g.*, *McDonnell v. United States*, 576 U.S. 1091 (2015). Here, Mr. Bannon makes an even stronger showing, as Judge Walker dissented from the denial of release pending appeal.

This case raises a second substantial question: there is an acknowledged circuit split regarding the appropriate test under § 3143(b) itself. Any issue on

which the circuits disagree is necessarily a substantial question. *See* Part IV, *infra*.

If Mr. Bannon is denied release, he will be forced to serve his prison sentence before this Court has a chance to consider a petition for a writ of certiorari, given the Court's upcoming Summer recess. *See* Part V, *infra*.

As Judge Walker stated, Mr. Bannon's case raises substantial legal questions, and he "should not go to prison before the Supreme Court considers his forthcoming petition for certiorari." Ex.A.5 (Walker, J., dissenting).

OPINIONS BELOW

The D.C. Circuit's panel order denying release, over Judge Walker's dissent, has not been reported; it is attached as Exhibit A. The District Court's order granting the government's motion to lift the stay of sentence is attached as Exhibit B. The District Court's order granting a stay of sentence pending appeal is attached as Exhibit C. The D.C. Circuit's panel opinion on the underlying claims was reported at 101 F.4th 16; it is attached as Exhibit D.

JURISDICTION

Pursuant to 18 U.S.C. § 3143(b), a "judicial officer" "shall order the release" of an individual who "has filed an appeal or a petition for a writ of certiorari" if the requirements of § 3143(b) are satisfied. This Court further has jurisdiction pursuant to 28 U.S.C. § 1651(a) and 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

2 U.S.C. § 192 states:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

Additional pertinent statutory provisions are reprinted in the Statutory Addendum. Ex.F.

STATEMENT

A. Factual Background.

On September 23, 2021, the House Select Committee addressing the events of January 6, 2021, issued a subpoena to Mr. Bannon, seeking information related to his communications with then-President Trump, White House and Trump Campaign staffers, and other matters. Ex.D.3.[3]

On October 6, 2021, President Trump's counsel informed Mr. Bannon's attorney that the subpoena sought information that was "protected from

[3] The Select Committee was not constituted in accordance with the grant of authority from the full House of Representatives and thus was not duly authorized to issue subpoenas. That significant legal issue is not directly presented in this Application but will be addressed in Mr. Bannon's further appeals.

disclosure by the executive and other privileges." JA444. President Trump's counsel further stipulated that "President Trump is prepared to defend these fundamental privileges in court." JA444. He then made clear that "President Trump instructs Mr. Bannon" to "where appropriate, invoke any immunities and privileges he may have from compelled testimony," to "not produce any documents concerning privileged material," and to "not provide any testimony" regarding the same. JA444.

President Trump later reiterated in writing his invocation of executive privilege. JA4781 ("When you first received the Subpoena to testify and provide documents, I invoked Executive Privilege.").

Mr. Bannon's attorney told Mr. Bannon that he did not have the power to waive that executive privilege, as it belonged solely to President Trump. JA359-372. Mr. Bannon's counsel formed that view after studying, *inter alia*, opinions of the Department of Justice's Office of Legal Counsel addressing whether a congressional subpoena can require an "Executive Branch employee or former employee to appear before Congress for a deposition while not permitting an appropriate Executive Branch employee to be present." JA368. Mr. Bannon's counsel also informed President Trump's counsel of his position

that the former President's "invocation of those privileges absolutely limits Mr. Bannon's ability to testify before Congress and provide documents." JA447.

As a result, Mr. Bannon's attorney wrote to the Select Committee on October 7, 2021—the return date of the subpoena—and explained his position that Mr. Bannon was unable to provide a response *until* an accommodation was reached and the executive-privilege issues resolved, either between the Committee and President Trump, or by a court in a civil suit. JA198–99. Mr. Bannon's counsel confirmed that "[w]e will comply with the directions of the courts." JA199.

The next day, the Select Committee responded by claiming the position taken by Mr. Bannon's counsel was "willful non-compliance." JA323–25. Mr. Bannon's counsel responded in writing that Mr. Bannon was not acting in "defiance" of the Committee—and in fact, "Mr. Bannon has testified on three prior occasions, before the Mueller Investigation, the House Intelligence Committee and the Senate Intelligence Committee." JA326. But "[i]n each of those instances," "President Trump waived his invocation of the executive privileges," and Mr. Bannon's counsel requested that the same accommodation process to resolve the privilege assertion should be followed here. *Id.* Mr. Bannon's counsel also cited several cases that he believed supported this position. *Id.*

The Select Committee declined to engage in the normal accommodation process or to have the matter resolved in civil litigation. Instead, on October 19, 2021—i.e., less than a week after Mr. Bannon's counsel's last letter—the Committee recommended that Mr. Bannon be found in contempt of Congress for refusing to comply with the subpoena. Ex.D.5. Just two days later, the House voted 229-202 to find Mr. Bannon in Contempt of Congress. JA339.

Only three weeks later, a grand jury returned an indictment against Mr. Bannon on two counts of violating 2 U.S.C. § 192, which states that "every person who having been summoned to give testimony or to produce papers" and "willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor." 2 U.S.C. § 192; Ex.D.5-6. Mr. Bannon's case proceeded on the first prong—i.e., he was charged with "willfully mak[ing] default."

B. Proceedings Below.

The trial took place in the U.S. District Court for the District of Columbia before the Hon. Carl J. Nichols. The government moved *in limine* to preclude Mr. Bannon from arguing, even as a defense, that he had relied in good faith on his counsel and that this reliance undercut the government's claim that he had "willfully" defaulted on the subpoena.

The District Court reluctantly granted the government's motion, finding that he was bound to follow the D.C. Circuit's 1961 decision in *Licavoli v.*

United States, 294 F.2d 207 (D.C. Cir. 1961), which held that good faith was irrelevant to any charge under § 192. The District Court noted that *Licavoli*'s construction of "willfully" was an anomaly. JA743; JA4582. Mr. Bannon's trial counsel asked, "[W]hat's the point of going to trial here if there are no defenses," to which the District Court responded, "[A]greed." JA3026-27. But the District Court concluded that *Licavoli* was binding, albeit highly questionable.

Accordingly, Mr. Bannon was barred from presenting any evidence or argument on good faith reliance on counsel. Ex.D.7; JA741. This allowed the prosecution to claim to the jury that Mr. Bannon had "ignore[d]" the subpoena, "thumb[ed] his nose" at the Select Committee, and that he had "no justification" for his actions. JA3913–16. The government argued to the jury that the only explanation for Mr. Bannon's position was that he thought he was "above the law" and "didn't care" and "had contempt" for the Committee. JA4518. Mr. Bannon was barred from responding to those false accusations about his state of mind.

In instructing the jury, the District Court ruled that the statute's "willfulness" requirement meant only that Mr. Bannon's actions had to be "deliberate and intentional." JA4582. As such, the District Court instructed the jury that "it is not a defense … that the defendant did not comply … because of the legal advice he received from his attorney or someone else,

because of his understanding or belief of what the law required or allowed, or because of his understanding that he had a legal privilege, such as executive privilege, that excused him from complying." JA4582.

On July 22, 2022, the jury found Mr. Bannon guilty on both counts. Ex.D.6. He was sentenced to four months' imprisonment. *Id.* The District Court concluded that the *mens rea* issue, among others, raised a substantial question under 18 U.S.C. § 3143(b), and accordingly granted Mr. Bannon's motion for release pending appeal. JA4762.

On appeal, the D.C. Circuit held that *Licavoli* was still binding. Ex.D.7. The D.C. Circuit acknowledged this Court has emphasized the "'general' rule" that "willfully" means a defendant must act with "'knowledge that his conduct was unlawful,'" an interpretation that strongly favors Mr. Bannon. Ex.D.9. The D.C. Circuit also acknowledged that the cases relied on by *Licavoli* addressed the *different* provision of § 192 that "does not use the term 'willfully,'" but that *Licavoli* had nonetheless concluded the exact same *mens rea* applied to both provisions. Ex.D.8.

Despite those substantial questions, the panel likewise concluded *Licavoli* was still binding, as it had not been unequivocally overruled by an intervening decision. Ex.D.7. The D.C. Circuit also noted "practical" concerns if the government had to prove a defendant knew he was acting unlawfully. Ex.D.8.

After the D.C. Circuit's opinion issued, the government asked the District Court to revoke bail, and that court agreed, concluding that after the D.C. Circuit panel had rejected Mr. Bannon's arguments that his case no longer presented a substantial question. Ex.B. The District Court ordered Mr. Bannon to surrender by July 1, 2024.

Mr. Bannon filed an emergency motion with the D.C. Circuit requesting release pending further appeals, which was denied 2-1 on June 20, 2024. Ex.A. The same panel that affirmed his convictions 3-0 addressed the release motion. This time, however, Judge Walker dissented, agreeing with Mr. Bannon that "the panel [on which Judge Walker himself had sat] felt obliged to disregard the Supreme Court's 'general rule' because *Licavoli* remained binding in this Circuit. The Supreme Court itself will have no such obstacle, however." Ex.A.4 (Walker, J., dissenting). He continued, "For a court unbound by *Licavoli*, like the Supreme Court, the proper interpretation of 'willfully' in Section 192 is 'a close question or one that very well could be decided the other way." *Id.*

Judge Walker's dissent concluded: "Because the Supreme Court is not bound by *Licavoli*, because *Licavoli*'s interpretation of 'willfully' is a close question, and because that question may well be material, Bannon should not go to prison before the Supreme Court considers his forthcoming petition for certiorari." Ex.A.5 (Walker, J., dissenting).

ARGUMENT

I. The Relevant Standard: Mr. Bannon Need Only Demonstrate a "Substantial Question."

Section 3143 states that a "judicial officer" "shall" order release where the movant satisfies the requirements of § 3143(b): (1) "the person is not likely to flee or pose a danger to the safety of any other person or the community if released"; (2) "the appeal is not for the purpose of delay"; and (3) the movant "raises a substantial question of law or fact likely to result in—(i) reversal, (ii) an order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." § 3143(b)(1).

That third factor—the "substantial question"—is at issue here. This Court reviews the "substantial question" issue *de novo*. *United States v. Pollard*, 778 F.2d 1177, 1181–82 (6th Cir. 1985).

The government contended below that Mr. Bannon must make an "additional" showing of a likelihood of en banc rehearing or Supreme Court review. CADC.Opp.7. Even the D.C. Circuit majority order, which rejected Mr. Bannon's motion for release, did not accept the government's position. Ex.A. Indeed, the government's argument fails for two reasons: (1) no such showing is required under § 3143, as explained next; and (2) even if it were, there is

good reason to believe this Court would be interested in further review, as explained below in Part III.

Section 3143 expressly applies to cases where the movant has *already* lost at the circuit court—e.g., where he has filed "a petition for writ of certiorari," § 3143(b)(1)—yet the statute nowhere changes the test or requires an additional showing in such circumstances.

There is only one test under § 3143, and it requires a "two-part inquiry." *United States v. Perholtz*, 836 F.2d 554, 555 (D.C. Cir. 1987). The Court first decides whether "the appeal raise[s] a substantial question." *Id.* The Court then *separately* looks at whether a new trial or lessened sentence would "likely" result "*if* that question is resolved in appellants' favor." *Id.* Thus, when inquiring about "likelihood," *the Court must assume the question will be resolved favorably*.

Contrary to the government's assertion below, CADC.Opp.7 & n.1, the "phrase 'likely to result in reversal or an order for a new trial' cannot reasonably be construed to require the … court to predict the probability of reversal," *United States v. Miller*, 753 F.2d 19, 23 (3d Cir. 1985).

"The federal courts are not to be put in the position of bookmakers who trade on the probability of ultimate outcome. Instead, that language must be read as going to the significance of the substantial issue to the ultimate disposition of the appeal." *Id.* Accordingly, "all" circuit courts have "concluded

that the statute does not require" a showing that the lower court "committed reversible error." *Pollard*, 778 F.2d at 1181–82.

The Solicitor General has previously agreed that § 3143 doesn't impose the same standard as for a stay pending appeal. In the *McDonnell* case (discussed in detail in Part III.B, *infra*), the Solicitor General advised this Court that because "'the statutory standard for determining whether a convicted defendant is entitled to be released pending a certiorari petition is clearly set out in 18 U.S.C. 3143(b),' … the application should be evaluated using the standard prescribed in Section 3143(b), *rather than under the stay factors that the Court applies when Congress has not established the governing criteria*." Memo. for the U.S. in Opposition 15, *McDonnell v. United States*, 15A218 (Aug. 26, 2015) (emphasis added).

Thus, unlike someone seeking a *stay* pending appeal, Mr. Bannon need not show there is a fair chance this Court would actually grant review and reverse. The government's invocation of emergency-stay cases below is thus misplaced. CADC.Opp.7–8.[4]

[4] The government has previously cited *McGee v. Alaska*, 463 U.S. 1339 (1983) (Rehnquist, J., in chambers), and *Julian v. United States*, 463 U.S. 1308 (1983) (Rehnquist, J., in chambers), as looking to the probability this Court would grant review in the context of a bail motion, *see* Resp.17, *Navarro v. United States*, No. 23A843 (U.S. Mar. 18, 2024). But those cases "arose before the enactment of the Bail Reform Act," thus they do "not set the standard for review under the Bail Reform Act, and furthermore would require inappropriate speculation by this Court." *United States v. Nacchio*, 608 F. Supp. 2d 1237, 1240 n.6 (D. Colo. 2009). This

As Judge Walker concluded below, Mr. Bannon easily demonstrates a substantial question, and that showing means he is entitled to continued release, given that this argument (if accepted) would entitle him to a new trial. *See* Parts II, *infra*. And even if a showing were needed that this Court may grant review, Mr. Bannon makes that showing. *See* Part III, *infra*.

II. There Is a Substantial Question Regarding the Meaning of "Willfully" In Section 192.

As Judge Nichols explained below, the D.C. Circuit's precedent construing "willfully" in § 192 is "not consistent with modern case law surrounding the use of the term, let alone the traditional definition of the word." JA2993; *see* Part II.A, *infra*. That same view led Judge Walker to dissent from the denial of release for Mr. Bannon below, even though Judge Walker himself had joined the panel decision ruling against Mr. Bannon. *See* Ex.A.4 (Walker, J., dissenting).

In fact, it appears this Court has *uniformly* construed the term "willfully" in the criminal context to require knowledge the act was unlawful. Part II.A, *infra*. The D.C. Circuit's precedent is also starkly inconsistent with this Court's canons of construction. Part II.B, *infra*. With all signs pointing in favor of Mr. Bannon's interpretation, this issue raises at least a substantial question.

Court has not cited those cases even once since the Bail Reform Act was passed forty years ago.

A. This Court Has Uniformly Interpreted "Willfully" in the Criminal Context to Require a Showing That the Defendant Acted with Knowledge His Conduct Was Unlawful.

When used in criminal statutes, "willfully" means an act "undertaken with a 'bad purpose.'" *Bryan v. United States*, 524 U.S. 184, 191–92 (1998). In other words, "the Government must prove that the defendant acted with knowledge that his conduct was unlawful." *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994); *see Wooden v. United States*, 595 U.S. 360, 378 (2022) (Kavanaugh, J., concurring) ("[W]ith respect to federal crimes requiring 'willfulness,' the Court generally requires the Government to prove that the defendant was aware that his conduct was unlawful."); *Rehaif v. United States*, 588 U.S. 225, 246 (2019) (Alito, J., dissenting) ("[W]e have construed the term as used in [criminal] statutes to mean the 'intentional violation of a known legal duty.'").

Indeed, it appears this is the *uniform* interpretation this Court has applied to "willfully" in the context of federal criminal statutes, dating back at least 150 years. *See Bryan*, 524 U.S. at 191–92; *Ratzlaf*, 510 U.S. at 137; *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 60 (2007) (when case is "on the criminal side of the law," "'willfully' typically narrows the otherwise sufficient intent, making the government prove something extra"); *Screws v. United States*, 325 U.S. 91, 101 (1945) ("[W]hen used in a criminal statute, it generally means an act done with a bad purpose."); *Spurr v. United States*, 174 U.S. 728, 735 (1899)

("signifying an evil intent without justifiable excuse"); *Felton v. United States*, 96 U.S. 699, 702 (1877) (same). Counsel is unaware of a contrary case.

If this Court simply adheres to its own longstanding rule, Mr. Bannon must get a new trial. But as Judge Walker explained in his dissent from denial of release, the D.C. Circuit panel felt obligated to disregard this Court's rule because of the D.C. Circuit's own sixty-year-old decision in *Licavoli*. Ex.A.4. This Court will not be so bound, however. Further, as explained next, there are numerous other reasons to conclude *Licavoli* is wrong.

B. Numerous Other Bases Demonstrate the D.C. Circuit's Precedent Is Wrong.

1. *Licavoli* Is Inconsistent with This Court's Textual Canons.

Besides defying this Court's apparently uniform rule of interpreting "willfully" in criminal statutes, *see* Part II.A, *supra*, the D.C. Circuit's textual analysis in *Licavoli* is also grievously inconsistent with this Court's canons of construction. *Licavoli* rested on the fact that this Court had held in a 1929 case that "act[ing] in good faith on the advice of competent counsel" is "no defense" against the *separate* provision in § 192 regarding witnesses who "having appeared, refuse[] to answer any question pertinent to the question under inquiry." Ex.D.8 (citing *Sinclair v. United States*, 279 U.S. 263, 299 (1929)).

But critically, as even the panel below acknowledged, the provision of § 192 addressed in that 1929 case "does not use the term 'willfully.'" *Id.* By

adding "willfully" *only* in the provision for which Mr. Bannon was convicted, Congress clearly intended to impose a higher *mens rea* requirement.

This Court has made this exact point in the context of a different statute: "The word 'willful' is omitted from the description of offenses in the latter part of this section. Its presence in the first cannot be regarded as mere surplusage; it means something. It implies on the part of the [defendant] knowledge and a purpose to do wrong." *Potter v. United States*, 155 U.S. 438, 446 (1894). "We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning," *Bailey v. United States*, 516 U.S. 137, 146 (1995), especially when the two different terms are "cheek by jowl in the same phrase," *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 84 (2017); *see Nielsen v. Preap*, 586 U.S. 392, 414 (2019).

But on notably thin reasoning, *Licavoli* reached the exact opposite conclusion: "The elements of intent are the same in both" clauses of § 192, and both require only intentional conduct. *Licavoli*, 294 F.2d at 209.

At most, *Licavoli*—and the majority order denying release, Ex.A.2—can explain why "willfully" wasn't added to the second clause of § 192, but they have no answer for why Congress *did* use "willfully"—rather than a lesser *mens rea*—in the clause of § 192 at issue here. Clearly, that choice "means something." *Potter*, 155 U.S. at 446. But *Licavoli* held it didn't. That is wrong.

2. This Court Has Expressly Recognized Section 192 Contains Two Different *Mens Rea* Elements.

Relatedly, this Court twice has addressed the "willfully" language in § 192—and both decisions strongly favor Mr. Bannon.

Licavoli relied on this Court's 1929 *Sinclair* decision, but in 1933 this Court expressly limited *Sinclair*'s rule to the lesser-*mens-rea* clause at issue in that case. "Two distinct offenses are described in the disjunctive [in § 192], and in only one of them is willfulness an element." *Murdock*, 290 U.S. at 397 (distinguishing *Sinclair*). Where the statute calls for willfulness, this Court held that a refusal to answer may be "intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense." *Id.* at 397–98.

That is what Mr. Bannon argued but was foreclosed by *Licavoli*, which summarily dismissed *Murdock* because it involved a tax statute. 294 F.2d at 208–09. But that completely missed the point that *Murdock* specifically distinguished and narrowed *Sinclair*, which *did* interpret § 192.[5]

[5] The government claimed below that *Murdock*'s narrowing of *Sinclair* is "dictum" because *Murdock* was a tax case. CADC.Opp.16. But distinguishing a prior decision is the opposite of dicta. Anyway, the D.C. Circuit should have "treat[ed] Supreme Court dicta as authoritative." *Bahlul v. United States*, 840 F.3d 757, 763 n.6 (D.C. Cir. 2016) (Kavanaugh, J., concurring).

This Court also addressed the "willfully" provision of § 192 in *McPhaul v. United States*, 364 U.S. 372 (1960), where the Court noted briefly there was a "prima facie case of willful failure to comply with the subpoena" only because the defendant had made no attempt to "state his reasons for noncompliance" to the committee until he appeared in person, thus denying the committee the chance to "tak[e] other appropriate steps to obtain the records." *Id.* at 379 (cleaned up). By contrast, Mr. Bannon's attorney was repeatedly in contact with the Select Committee and provided explanations for why Mr. Bannon felt unable to comply until the privilege issues were resolved, as had occurred at least three times when he had been subpoenaed in the past. Ex.D.3–5.

McPhaul also said that even when the defendant failed to provide any reasons whatsoever for noncompliance, he was *still* entitled to "present some evidence to explain or justify his refusal," so it could be "resol[ved] by the jury." *McPhaul*, 364 U.S. at 379. But even that is barred under D.C. Circuit precedent.[6]

[6] The majority order denying release claimed this Court suggested in *United States v. Bryan*, 339 U.S. 323 (1950), that "willfully" in § 192 means "only that a defendant act 'deliberately and intentionally,'" Ex.A.2. Respectfully, that is incorrect. At most, *Bryan* made the same point as *McPhaul* about a recipient who "refuses to give any reason" to the committee for "fail[ing] to deliver" requested documents. *Bryan*, 339 U.S. at 333. It is uncontested that Mr. Bannon's attorney *did* provide reasons to the Committee. And as noted above, *McPhaul* made clear that even when a recipient gives no reasons at all, he is *still* entitled to present his explanation to the jury—but *Licavoli* precludes even that.

C. The D.C. Circuit's "Practical" Concerns Are Misplaced.

The D.C. Circuit panel opinion also expressed "practical" concerns about the government affirmatively having to prove "bad faith." Ex.D.8. That characterization misses an important point: even if it did not negate *mens rea* as a matter of law, Mr. Bannon's good faith reliance on counsel at least should have been *presented to the jury* as a defense and to undercut the government's repeated (and false) accusations that he had "ignore[d]" the subpoena. *See McPhaul*, 364 U.S. at 379. Courts and juries routinely consider whether a defendant's conduct was willful. The fact that it is sometimes difficult to prove willfulness is a feature, not a bug.

In any event, practical concerns cannot overcome the text of § 192, which, as explained above, carefully uses the word "willfully" to indicate a high *mens rea* threshold, in accordance with this Court's general rule on construing that term. *See Helix Energy Sols. Grp., Inc. v. Hewitt*, 598 U.S. 39, 59 (2023) ("'[E]ven the most formidable policy arguments cannot overcome a clear' textual directive.").

Moreover, there is no "practical" problem with allowing a defendant to raise advice-of-counsel arguments so a jury can weigh them. That is hardly analogous to the government's fear that defendants will "manufactur[e] a claim of good faith" (which would seem to be a logical impossibility, in any event). CADC.Opp.15.

In fact, DOJ recently instructed its own attorneys to refuse to respond to congressional subpoenas issued regarding Hunter Biden, apparently on privilege grounds.[7] It can hardly be an "idiosyncratic" approach if DOJ itself is doing it.

D. The Improperly Lowered *Mens Rea* Prevented Mr. Bannon from Making His Defense.

Prosecutions under § 192 are exceedingly rare, despite the prevalence of high-profile disputes over such subpoenas. Before the Biden Administration, the last time the government convinced a jury to convict someone under § 192 was fifty years ago.[8]

Given this, one would assume that the government would pursue such charges only in the most extraordinary circumstances—and that is certainly how the prosecution tried to portray Mr. Bannon's actions to the jury, which was told that he had "ignore[d]" the subpoena, "thumb[ed] his nose" at the Select Committee, and that he had "no justification" for his actions. JA3913–16. The jury heard that the only explanation for his actions was that he thought

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[7] Josh Gerstein & Kyle Cheney, *'Are You Kidding Me?': Biden-Appointed Judge Torches DOJ for Blowing off Hunter Biden-Related Subpoenas from House GOP*, Politico (Apr. 5, 2024), https://www.politico.com/news/2024/04/05/biden-appointed-judge-torches-doj-00150884.

[8] Todd Garvey & Michael A. Foster, Cong. Rsch. Serv., LSB10660, *The Bannon Indictment and Prosecution* 1–2, (Nov. 19, 2021), https://crsreports.congress.gov/product/pdf/LSB/LSB10660.

he was "above the law" and "didn't care" and "had contempt" for the Committee. JA4518.

Mr. Bannon was unable to respond to those false accusations about his state of mind. That was a crucial flaw in his trial. As Judge Walker explained in his dissent from the denial of release, "eliminating the prosecutor's burden of proving *mens rea* is a serious constitutional error." Ex.A.5 (Walker, J., dissenting) (quoting *United States v. Sheehan*, 512 F.3d 621, 631 (D.C. Cir. 2008)). "Error cannot be harmless where it prevents the defendant from providing an evidentiary basis for his defense." *Sheehan*, 512 F.3d at 633.

Yet that is exactly what happened here, as the D.C. Circuit panel opinion recognized: *Licavoli* "precluded Bannon from presenting such a defense at trial, and [the District Court] instructed the jury consistent with those rulings." Ex.D.7.

E. The Rule of Lenity Favors Rejecting the D.C. Circuit's Test.

Finally, construing "willfully" in § 192 contrary to this Court's apparently uniform precedent and canons of construction would also raise serious lenity concerns, especially when combined with the 50-year practice of not pursuing convictions under § 192, let alone when the defendant relied in good faith on advice of counsel. *See Wooden*, 142 S. Ct. at 1081 (Gorsuch, J., concurring) ("[A]ny reasonable doubt about the application of a penal law must be resolved in favor of liberty."); *see Reno v. Koray*, 515 U.S. 50, 64 (1995)

(lenity is triggered when "after seizing everything from which aid can be derived," the Court can make "no more than a guess as to what Congress intended"). These lenity concerns provide yet another basis for finding the issue to be substantial.

* * *

For all these reasons, the *mens rea* issue is at least a substantial question. Accordingly, Mr. "Bannon should not go to prison before the Supreme Court considers his forthcoming petition for certiorari." Ex.A.5 (Walker, J., dissenting).

III. There Are Good Reasons to Believe This Court Would Grant Review.

As explained above, Mr. Bannon need not make a showing that there is a fair prospect or likelihood that this Court will actually *grant* certiorari. *See* Part I, *supra*. But even if considerations of this Court's further review were relevant, there are good reasons to believe the Court would grant review of *Licavoli*'s anomalous interpretation of "willfully," which contradicts the strong weight of this Court's precedent and core canons of statutory construction.

Indeed, as Judge Nichols explained below, the D.C. Circuit's precedent construing "willfully" in § 192 is "not consistent with modern case law surrounding the use of the term, let alone the traditional definition of the word," JA2993, and thus this case presents an ideal vehicle for addressing and

reversing the D.C. Circuit's divergent precedent in this area. Further, this Court has previously demonstrated a strong interest in § 192 and has also granted relief in similar postures in the past.

A. This Court Has Granted Nearly Twenty Cases Arising out of Section 192 Convictions and Frequently Interprets "Willfully" in Other Contexts.

This Court has demonstrated an exceedingly strong interest in interpreting § 192, granting review in no fewer than *nineteen* cases involving various aspects of that statute, despite its brevity, which represents a significant grant rate.[9]

The Court's interest may be due to the importance of preserving the rights of citizens compelled to appear before congressional committees. For instance, there were widespread concerns that § 192 was being used for political purposes during the days of the House Committee on Un-American Activities in the 1950s and 1960s. Certiorari grants ceased in the following decades, but only because the government stopped pursuing § 192 as a prosecution tool.

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[9] *Gojack v. United States*, 384 U.S. 702 (1966); *Yellin v. United States*, 374 U.S. 109 (1963); *Russell v. United States*, 369 U.S. 749 (1962); *Hutcheson v. United States*, 369 U.S. 599 (1962); *Deutch v. United States*, 367 U.S. 456 (1961); *Braden v. United States*, 365 U.S. 431 (1961); *Wilkinson v. United States*, 365 U.S. 399 (1961); *McPhaul*, 364 U.S. 372; *Barenblatt v. United States*, 360 U.S. 109 (1959); *Flaxer v. United States*, 358 U.S. 147 (1958); *Sacher v. United States*, 356 U.S. 576 (1958); *Watkins v. United States*, 354 U.S. 178 (1957); *Bart v. United States*, 349 U.S. 219 (1955); *Emspak v. United States*, 349 U.S. 190 (1955); *Quinn v. United States*, 349 U.S. 155 (1955); *United States v. Rumely*, 345 U.S. 41 (1953); *United States v. Fleischman*, 339 U.S. 349 (1950); *Bryan*, 339 U.S. 323; *Sinclair*, 279 U.S. 263.

The government has now resurrected it after fifty years. Given *Licavoli* and the D.C. Circuit Court decision below, there is little incentive for future congressional committees to accommodate assertions of executive privilege. This creates clear separation-of-powers concerns that could unduly infringe on the operations of the Executive Branch.

The Court's demonstrated interest in reviewing cases arising under § 192 alone provides a sufficient showing this Court would strongly consider granting review. *See Quinn v. United States*, 349 U.S. 155, 157 (1955) (acknowledging the Court was likelier to grant certiorari on § 192 cases because of "the fundamental and recurrent character of the questions presented").

Further, as noted above, the few Supreme Court cases addressing the relevant clause of § 192 favor Mr. Bannon, and this Court routinely grants review of lower court decisions that are in tension with the Court's own decisions. *See* Sup. Ct. R. 10(c).[10]

Finally, the Court frequently and recently has granted cases touching on the interpretation of "willfully" in various contexts. *See, e.g., Taggart v. Lorenzen*, 587 U.S. 554, 565 (2019); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579

[10] The government claimed below there is no "conflict among the circuits," CADC.Opp.18, but that is misleading given that § 192 cases almost invariably arise in D.C. If anything, this *favors* further review because all § 192 cases will be subject to the broad opinion in *Licavoli*.

U.S. 93, 106 n.* (2016); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 584 (2010); *Bryan*, 524 U.S. at 191–92; *Ratzlaf*, 510 U.S. at 137.

B. This Court Has Granted Relief in Nearly Identical Circumstances.

Under nearly identical procedural circumstances, this Court has granted emergency relief to ensure the defendant remained free pending completion of appeals. For example, in the "corruption" case against Governor Bob McDonnell—which Judge Walker cited in his dissent from denial of release below, Ex.A.5 (Walker, J., dissenting)—the Fourth Circuit unanimously rejected Gov. McDonnell's challenges to his convictions, *United States v. McDonnell*, 792 F.3d 478, 486 (4th Cir. 2015), and *not a single circuit judge voted in favor of rehearing* en banc, Order, *United States v. McDonnell*, No. 15-4019 (4th Cir. Aug. 11, 2015), ECF No. 131.

This Court, however, unanimously granted Gov. McDonnell's emergency application to ensure he remained released pending the outcome of a forthcoming petition for a writ of certiorari, *McDonnell*, 576 U.S. 1091, and then later granted review and reversed the Fourth Circuit in a 9-0 decision, *McDonnell v. United States*, 579 U.S. 550, 580–81 (2016).

Clearly this Court believed there was a substantial question despite the circuit court's unanimous ruling against Gov. McDonnell and despite the lack

of interest among any of the circuit judges in rehearing the case en banc. If anything, Mr. Bannon's case is even stronger because he, unlike Gov. McDonnell, will otherwise be forced to serve his entire sentence before his appeals are complete.

C. The Stakes Are Extraordinarily High.

Before Mr. Bannon's case, there was significant doubt about whether *Licavoli* remained good law in the D.C. Circuit, as Judge Nichols noted below. But now that a panel of the D.C. Circuit has said *Licavoli* remains binding, there is no obstacle to future indictments of anyone and everyone who allegedly defaults on a congressional subpoena, even when they had good faith defenses like advice of counsel or executive privilege—defenses that *Licavoli* will bar them even from presenting to a jury.

Examples of individuals held in contempt of Congress for allegedly disregarding subpoenas include Attorneys General of both parties, the White House Counsel, and the EPA Administrator.[11] In the future, when the House or Senate and the Executive Branch are controlled by the same party, there is

[11] Final Vote Results for Roll Call 489, July 17, 2019, https://clerk.house.gov/evs/2019/roll489.xml (William Barr) (H.R. Res. 497); Final Vote Results for Roll Call 441, June 28, 2012, https://clerk.house.gov/evs/2012/roll441.xml (Eric Holder) (H.R. Res. 711); Final Vote Results for Roll Call 60, Feb. 14, 2008, https://clerk.house.gov/evs/2008/roll060.xml (Harriet Miers) (H.R. Res. 982); Philip Shabecoff, *House Charges Head of E.P.A. with Contempt*, N.Y. Times, Dec. 17, 1982, at A1, https://www.nytimes.com/1982/12/17/us/house-charges-head-of-epa-with-contempt.html.

every reason to fear that former Executive Branch officials will face prison after declining to provide privileged materials to a committee, even where the position taken was based upon the advice of counsel in good faith and requested further negotiations.

The government argued below that it is unlikely there will be such prosecutions when officials invoke executive privilege. CADC.Opp.22–23. Indeed, OLC recently issued another opinion claiming that § 192 "does not apply to Executive Branch officials who do not comply with a congressional subpoena based on a presidential assertion of executive privilege." *Executive Privilege Assertion for Audio Recordings* at 4, Christopher Fonzone, Ass't Att'y Gen. to Merrick Garland, Att'y Gen., May 15, 2024, https://tinyurl.com/r5tmyk85.

But that memo strongly supports Mr. Bannon's request because it shows that not even OLC—which speaks for the Department of Justice itself—will actually defend the holding of *Licavoli*, which says the *only* question for *mens rea* is whether the defendant intentionally did not respond.

Any executive official who asserts executive privilege is "intentionally" declining to provide the subpoenaed materials—and therefore under *Licavoli* has *necessarily* violated § 192 and is barred even from presenting evidence of good faith non-compliance. But OLC has consistently construed § 192 as not covering that scenario, demonstrating the issue is far more nuanced than

Licavoli's simplistic and atextual approach. *See* OLC.Op.50 n.34 (PDF pagination).

There is good reason to believe this Court would consider stepping in and shutting this Pandora's Box.

D. This Application Differs from Peter Navarro's.

At the District Court, the government relied on Your Honor's denial of Peter Navarro's application for release pending appeal after he was convicted under § 192. *See Navarro v. United States*, No. 23A843 (U.S. 2024). But if anything, that denial supports Mr. Bannon. Navarro argued at length that this Court would likely disagree with *Licavoli*, and in response, Your Honor issued an in-chambers decision—the first in many years issued by a Justice—to explain that the denial was only because of procedural concerns specific to Navarro's case, which were "distinct from his pending appeal on the merits." *Navarro v. United States*, 144 S. Ct. 771 (2024) (Roberts, C.J., in chambers).

Respectfully, if the underlying merits presented by Navarro were of no interest or substantiality, presumably the application would simply have been without explanation, as frequently occurs. Mr. Bannon's motion cleanly presents the same important *mens rea* issue, but without the procedural concerns present in Mr. Navarro's motion.

E. In All Events, the Court Should Still Grant Release.

Finally, even if this Court considers the odds of future review to be both relevant and low, the Court should still grant continued release.

As other courts have explained in the context of a defendant who has already been on release pending appeal: "Even though the Court considers remote the likelihood of the Supreme Court's granting the [certiorari] petition, the Court does not relish the prospect of revoking [the defendant's] bail and requiring his immediate incarceration, only to have the Supreme Court do the unexpected and accept certiorari." *United States v. Pettengill*, No. 1:09-cr-138, 2011 WL 6945708, at *2 (D. Me. Dec. 30, 2011).

In such circumstances, "an additional delay to obtain the most authoritative answer [from the Supreme Court] seems wise." *Id.* So too here.

IV. There Is Also a Substantial Question Regarding the Test Under Section 3143.

Mr. Bannon's case raises a second substantial question, this one about the test for "substantiality" under 18 U.S.C. § 3143(b) itself.[12] As this Court has said in a different context, the "construction of the words 'substantial question' is itself a substantial question." *Herzog*, 75 S. Ct. at 350. And there is a circuit split on this issue, meaning it is necessarily a substantial question

[12] This argument was fully preserved below, but the majority order did not address it.

with a fair prospect of review by this Court (again, assuming such a showing is needed).

The D.C. Circuit holds that § 3143 requires a matter that is "a 'close' question or one that very well could be decided the other way." *Perholtz*, 836 F.2d at 555. But *Perholtz* expressly recognized that other circuits disagree and apply a distinctly lower threshold. *Id.* In the Ninth Circuit, for example, a defendant must present "only a non-frivolous issue that, if decided in the defendant's favor, would likely result in reversal or could satisfy one of the other conditions." *Garcia*, 340 F.3d at 1020 n.5.

If Mr. Bannon were in the Ninth Circuit, with its lesser test, he would remain out on appeal while he pursued further review; indeed, Judge Walker found that Mr. Bannon would satisfy even the D.C. Circuit's stringent test, which means he would *easily* satisfy the Ninth Circuit's. By forcing Mr. Bannon instead to serve his entire sentence before his appeals are completed, the government is necessarily precluding any opportunity for him to serve less time in prison. That satisfies § 3143's requirements because it also applies to issues that would result in a shorter prison stint. *See* § 3143(b)(1)(B)(iv).

V. Other Considerations Strongly Favor Mr. Bannon.

Several other points warrant emphasizing. If Mr. Bannon is not granted continued release pending further appeal, he would likely be forced to serve his entire sentence before this Court could consider the important issues raised

in his case, because his sentence would run during the Summer and Fall of 2024, during the Summer recess.

The Court should also be mindful of the government's own conduct when it comes to congressional subpoenas. Congress recently issued subpoenas to DOJ regarding Hunter Biden, yet DOJ instructed its Tax Division lawyers to refuse to comply.[13] Judge Reyes in the U.S. District Court for the District of Columbia sharply criticized DOJ for the hypocrisy: "There's a person in jail right now [Navarro] because you all brought a criminal lawsuit against him because he did not appear for a House subpoena. … And now you guys are flouting those subpoenas. … And you don't have to show up?"[14]

"Jail for thee, not for me" is hardly an acceptable position for the government. The government stated below that "equal justice under the law" and an "[e]ven-handed application of the bail statute" required promptly imprisoning Mr. Bannon. CADC.Opp.23. Such aphorisms ring hollow when DOJ itself ignores House subpoenas and faces no repercussions.

An even-handed approach thus strongly favors allowing Mr. Bannon to remain on release. At the very least, DOJ's decision to ignore congressional subpoenas demonstrates both the significance of the *mens rea* issue as a matter

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[13] Gerstein & Cheney, *'Are You Kidding Me?'*, *supra* (referencing *Comm. on the Judiciary v. Daly*, No. 1:24-cv-815 (D.D.C.)).

[14] *Id.*

of law and also the illogic of preventing Mr. Bannon from even arguing to the jury that his reliance on advice of counsel undermined the government's case for "willfulness."

There is also no denying the fact that the government seeks to imprison Mr. Bannon for the four-month period immediately preceding the November presidential election. There is no reason for that outcome in a case that presents substantial legal issues.

As Judge Walker concluded in his dissent from the denial of release: "Bannon should not go to prison before the Supreme Court considers his forthcoming petition for certiorari." Ex.A.5 (Walker, J., dissenting). This Court should grant his Application.

CONCLUSION

For the foregoing reasons, Mr. Bannon respectfully requests that his Application be granted and that he remain on release pending conclusion of his appeals, including a petition for a writ of certiorari, if timely sought. If necessary, Mr. Bannon respectfully requests that the Court issue an administrative stay of the July 1 surrender date to allow for sufficient time to consider this matter.[15]

June 21, 2024

Respectfully submitted,

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[15] The D.C. Circuit's judgment has issued, so this Court may wish to expedite merits review by treating this Application as a petition for a writ of certiorari and granting it, but that alone will not delay the surrender date.